Friday, 21 November 1947

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

C O N F E R E N C E

On

Procedure regarding Summation.

Before:

MAJOR GENERAL MYRON C. CRAMER,
Acting President of the Tribunal and
Member from the United States of
America, and

HON. E. STUART McDOUGALL, Justice,
Member from the Dominion of
Canada.

Reported by

Jack Greenberg
Chief Court Reporter
IMTFE

Appearances:

For the Prosecution Section

Mr. Joseph B. Keenan, Chief of Counsel
Mr. Frank S. Tavenner, Jr.
Mr. Solis Horwitz

For the Defense Section

Mr. George F. Blewett
Mr. John G. Brannon
Mr. Alfred W. Brooks
Mr. Roger F. Cole
Mr. Owen Cunningham
Mr. M. KANZAKI
Dr. Ichiro KIYOSE
Mr. Michael Levin
Mr. William Logan
Mr. L. J. McManus
Mr. SASAGAWA
Dr. Kenzo TAKAYANAGI

For the Secretariat

Mr. Paul Lynch, Clerk of the Court

The proceedings were begun at 1605.

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ACTING PRESIDENT: I called this as an informal conference in connection with the procedure at the end of the trial with regard to summation, arguments and various things. There have been several things suggested by the Tribunal and others. Among them was that memorandum that I had the other day, one to the prosecution and one to the defense. It includes:

"1. How the argument is to be divided between counsel (a) for the prosecution, (b) for the defense; e.g., will the defense be allowed separate speeches to cover (1) questions of law generally, (2) general phases plus (3) argument for each individual accused?

"2. Is the argument to be submitted on 'briefs' (written argument not read into the transcript) supplemented by brief oral arguments, or should all arguments be read 'in extenso' and taken down in open court?

"3. Will written arguments be submitted in advance (a) to Members of the Tribunal and (b) to defense and prosecution respectively?"

Now, I said in that memorandum, "There are

probably other matters that should be covered, and I would be glad to have any suggestions you may care to make." That applies to the prosecution and the defense, both.

MR. McMANUS: General, might I ask this: At the end of the case will there be individual renewal of motions to dismiss?

ACTING PRESIDENT: That is up to defense.

MR. McMANUS: The usual procedure, I believe, in individual cases is that at the end of the case they renew their motions to dismiss, after the defense case is completed. I wonder if they will follow the same procedure here.

MR. KEENAN: Mr. President, I have to suggest that this is quite different from any criminal proceeding where motions have been urged at the end of the whole case. Those cases are where we have juries. I am not talking about military proceedings now; I am talking about in civilian life, the criminal trials. I see utterly no sense in having arguments on motions and then having a great deal repeated, as undoubtedly there will be, in what might be called the general summation.

Therefore, I respectfully ask the Court to give grave consideration to our request that this is

not an occasion that requires any such motions, that the Charter makes no such provision, and that we proceed at the termination of taking all the evidence as outlined in the Charter which, I think, clearly sets forth the procedure and the order in which it takes place. I think it is mandatory, with great respect to the Court; I do not think the Court has any latitude in it; I do not think counsel have any opportunity to agree upon it.

But the first point is that, on the matter of motions at the end of all the testimony -- that is tantamount to a type of summation in any event -- of course, the Court will make the ruling, but the prosecution will respectfully but vigorously oppose any such procedure as being fruitless and bootless and not needed in a trial of this nature.

MR. McMANUS: Mr. President, if you will recollect, at the end of the prosecution's case, when I first came up to make my motions, I wanted to join in every motion heretofore made, which were made before the arrival of the American attorneys, but Sir William stated at that time that it was not the proper time for me to request that I should have my client join in all such motions, that at the end of the case would possibly be the time or when all the

evidence is in.

I agree with Mr. Keenan that maybe there should not be too many side arguments on motions, but at least the individual defense counsel should be permitted an opportunity to join in motions which their clients had not joined in heretofore.

MR. JUSTICE McDOUGALL: To get the air cleared on that, what type of motion are you talking about?

MR. McMANUS: I am talking about just the ordinary motions to dismiss.

MR. JUSTICE McDOUGALL: You have had those, and they have been denied. Is it these same motions you wish to renew?

MR. McMANUS: Usually, Judge, after the presentation of the prosecution's case, motions are made to dismiss. When they are denied, then at the end of the entire case there is a renewal of the motions: You ask that the motions be renewed, but you don't have to argue them. But then, I would like to be afforded the opportunity to have my client join in all the motions that have been made which I did not have the opportunity to join in because I wasn't here.

ACTING PRESIDENT: Didn't you have that

opportunity when you made your motions at the end of the prosecution's case?

MR. McMANUS: Yes, but Sir William said that was not the proper time.

MR. BROOKS: Mr. President, that is the customary procedure in my state, at least, but they are not argued. In other words, you can renew your motion because the Court has heard your evidence as well as what the prosecution has, and they might change their decision. But there is no argument; it is just a renewal of the motion. You state, "At this time I renew my motion to dismiss." That is all there is to it.

MR. BRANNON: Mr. President, I suggest that we proceed with the matter at hand here.

ACTING PRESIDENT: Just a minute. We might as well finish this while we are at it. Has anybody else any views on it?

MR. BRANNON: In regard to that, it could be simply an oral motion or a written motion without argument which would exhaust no time at all. Therefore, I don't believe it would be an issue.

MR. JUSTICE McDOUGALL: I can only suggest, gentlemen, that you do not count on that. I know the views of most members of the Court, and I think it is

unlikely that they would consider hearing the same motions over again.

MR. McMANUS: There would be no argument on the motions, Judge. You just informally make the statement that you renew your motions heretofore made, and you also request that you be permitted to join in whatever motions had been made in which your client had not joined.

ACTING PRESIDENT: I think we have had enough.

MR. KEENAN: Mr. Justice, that is the procedure that is employed only for purposes of appeal in our state and federal courts at home to comply with Code provisions.

MR. LOGAN: Mr. President, I might suggest as a practical matter, if any such motions are contemplated, they can be succinctly stated in the summation.

MR. CUNNINGHAM: That is an individual proposition. Each man should have the right to determine when he makes his motion and when he doesn't make his motion to dismiss. If a man wants to renew his motion to dismiss at the close of his individual case, he has the right to do that, and nobody has the right to tell him he cannot. That's the way I look at that.

MR. KEENAN: That's Cunningham on Procedure. I don't recognize its validity.

ACTING PRESIDENT: We have enough to put it up to the Tribunal now. That is something we cannot answer at the present time.

Now, in regard to the next thing to take up, should we take it up in the order I named them or in some other way?

MR. LOGAN: What was the first one you had there?

ACTING PRESIDENT: "How the argument is to be divided between counsel (a) for the prosecution, (b) for the defense; e.g., will the defense be allowed separate speeches to cover (1) questions of law generally, (2) general phases plus (3) argument for each individual accused?"

I thought the prosecution and defense had gotten together in consultation on some of these points.

MR. LOGAN: Mr. Acting President, before that point is taken up, I think there is a more basic proposition that should be decided. The Charter provides, under 14(f), "that the accused may address the Tribunal" and "(g) that the prosecution may address the Tribunal."

MR. KEENAN: Do you mind an interruption for a moment? Would you read the heading of that article?

MR. LOGAN: "Article 15. Course of Trial Proceedings. The proceedings at the Trial will take the following course:

"f. Accused (by counsel only, if represented) may address the Tribunal.

"g. The prosecution may address the Tribunal."

Now, several weeks ago we had a discussion with Mr. Keenan, and it was our opinion at that time that some provision should be made that the defense have an opportunity to rebut or answer the prosecution's summation; and Mr. Keenan talked it over and tentatively agreed on a method whereby the prosecution would sum up first, then the defense and then the prosecution reply. Then he later stated that he didn't think that was possible under the Charter and he didn't feel that he wanted to apply to amend the Charter.

Well, there have been some instances during the course of this trial where the Charter has been diverted from. For example, there is a provision in here -- I can mention one or two of them -- that the trial should be conducted in the English language and

the language of the accused, and yet the French and the Russians, and maybe some of the others, put it in their language.

Then there was another diversion from the Charter -- this is no provision -- in the same Article, Article 15, "Course of Trial Proceedings," when we thought that we should be given the right, as is our custom, to make motions to dismiss after the prosecution's case, which was also granted.

Now, it seems, there is going to be another diversion from this same Article, Article 15. There is no provision there for rebuttal evidence, and the Tribunal has indicated that it is going to hear rebuttal evidence. We say that we should be given an opportunity to reply or rebut or answer -- whatever you want to call it -- the prosecution's summation. Personnally, to me it doesn't make a bit of difference whether the prosecution sums up first, then the defense sums up, and then the prosecution rebuts, or whether we sum up first, the prosecution answers us and we rebut. To me it doesn't make a bit of difference. But some procedure -- in order to obtain a fair trial here, at least some semblance of it in the final phase -- should be provided whereby we have the opportunity to answer the prosecution

summation.

After all, it is a general procedure which is generally followed in trials in the United States that somewhere along the line the defense has an opportunity to answer. Of course, in some cases, in trials without jury, there is no summation, and the matter is submitted to the Court on briefs. That is handled in various ways, but always either side has the chance to answer the other. Sometimes it is handled by an original exchange of briefs between the parties, to be submitted to the Court. Then each side has an opportunity to submit reply briefs -- that is in cases without jury.-- each replying to the other.

But in this case, where the prosecution has had the burden of proof, it is very difficult for the defense to sum up first as provided in this Charter, and then have the prosecution answer us. We have to guess what the prosecution claims the evidence is and anticipate it and answer it ahead of time. We may put in our summation many matters that the prosecution doesn't even contend they have proven; we don't know. It is trying to anticipate what they are going to argue in their summation.

Certainly, any procedure such as was adopted

on the motions to dismiss after the prosecution's case should not be followed in this summation. I am referring particularly to document 0001. That document contains so many erroneous statements that, in my opinion, if a similar document is going to be submitted at the end of the prosecution's case, we should have an ample opportunity to go through it carefully to correct any errors that might be in it.

Therefore, I say that the first thing that we should decide is the order of procedure of summation. Then, when we find that out, we can talk about other matters as general arguments, general summation or individual summations.

ACTING PRESIDENT: That comes down clearly to a question of interpretation of the Charter, whether we are bound by this to follow the order it puts here or whether, by interpreting it without any change in the Charter, you can have the ordinary system of prosecution summing up first, defense making their final argument, and then the prosecution rebutting.

MR. BROOKS: Or it might be, General, that in this case the provision is that the defense make their statement, the prosecution make theirs, and then the defense rebut.

MR. KEENAN: Mr. President, I don't want to prolong this discussion unnecessarily, but the practice that is set forth in this Charter is not at variance with many of the jurisdictions in the United States. It follows exactly that of New York State, of the federal courts in many of the districts, including all of New York State. It follows that of Pennsylvania according to Mr. Horwitz. It follows the general system, I understand, that prevails under the circumstances in the United Kingdom. I am not attempting to tell you what are the branches of it.

MR. JUSTICE McDOUGALL: It is the universal Anglo-Saxon procedure.

MR. KEENAN: And I want to say, Mr. President, if that is the rule of the Charter, we would like to have a direction from the Court on it because we are all working on our summations, and we see no reason by way of a charge of unfairness to the accused. Now, it is rather well known that this is a long trial. The Indictment sets forth with great particulars the charges, and I doubt very much that there will be anything of a surprising nature by way of claims of what the evidence shows either from the prosecution or from the accused's counsel. Therefore, I personally believe that the Charter is clear and explicit

upon this point of procedure, and that it does not permit variation. But that, of course, is for the Court to decide, and I would think, respectfully, if that decision could be made at the earliest convenient moment, it would be a help to all of us.

ACTING PRESIDENT: Your proposition is that the defense present their closing argument first and the prosecution second?

MR. KEENAN: That's right. Of course, as a matter of fact, our complete summation will be finished before any summation is made by the accused at any time, and we do not ask for any opportunity to reply. We make this suggestion respectfully, both for the purpose of meeting any objections voiced by Mr. Logan or any of his other colleagues, and also for the purpose of not unduly prolonging the proceedings in the Court: that each side be permitted to furnish, within a limited period of time, briefs of limited size, that is, in accordance with the rules prevailing. There is a limitation placed upon the size of the brief. But we have to suggest to the Court that we would subscribe to that privilege. Our summation is not to be divided; it will be a single document, and it will, we think, adequately cover our claims. Of course, if the privilege is given to

the accused of filing briefs, we would like to have it likewise accorded to us although we would not expect to employ it extensively.

ACTING PRESIDENT: Does that include furnishing the defense with a copy of your summation before they present theirs?

MR. KEENAN: No.

MR. LOGAN: Do you contend, Mr. Keenan, that under this Charter it must be followed, that the accused address first and then the prosecution, and that is all there is to it?

MR. KEENAN: I think that is clearly what it states.

MR. LOGAN: Do you find anything in the Charter permitting you to introduce rebuttal evidence?

MR. KEENAN: I do not.

MR. JUSTICE McDOUGALL: The real point, for the moment, is --

MR. KEENAN: May I interrupt for a moment? I don't see it categorically stated, but it does say "the prosecution and defense ..." Will you read that?

MR. LOGAN: "d. The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal."

MR. KEENAN: It doesn't say in what order

they will offer it; that is, it doesn't exclude the ordinary right of offering rebuttal testimony.

MR. LOGAN: Except this: that the word "prosecution" appears first, and the word "defense" appears second. And the same way with f and g: The "accused" appears first, and the "prosecution" appears second.

MR. KEENAN: That is not true. It is in that single paragraph where it says the prosecution and defense may present evidence, but it doesn't exclude the customary right of rebuttal that exists, I think, in all jurisdictions.

MR. CUNNINGHAM: That is not true.

MR. LOGAN: Is it your contention, Mr. Keenan, if the Tribunal should approve it, we couldn't agree on a change of f and g without an amendment to the Charter?

MR. KEENAN: That is right. We could with an amendment to the Charter but not otherwise: my honest opinion.

MR. McMANUS: If there is to be rebuttal, why shouldn't there be surrebuttal?

MR. KEENAN: Why shouldn't there be sur-surrebuttal after that? There has to be an end after that.

MR. CUNNINGHAM: There is no doubt about that. The Charter specifically gives that order, and that is the way it ought to be followed. If you are going to construe it the same way on the question of argument, summations, it is logical.

ACTING PRESIDENT: I think we have gone far enough on that. That is for the Tribunal to decide, and we will have to fight that out by ourselves. Mr. Justice McDougall wants to ask a question.

MR. JUSTICE McDOUGALL: The question seems to be this: Has the prosecution, other than on the ground of interpretation of the Charter, any objection to adopting the suggestion made by Mr. Logan that the prosecution open, the defense answer, and the prosecution reply? Is there any objection to that other than the right to do so under the Charter?

MR. KEENAN: Very frankly, we have. It imposes a very substantial burden upon the prosecution. It has carried it throughout. And to prepare a complete summation, as we are in the process of doing now, and then to have to repeat such parts of it thereafter, we think, is unnecessarily burdensome, and we don't want to incur it unless it is necessary.

MR. BRANNON: Would there be a repeating, Mr. Keenan? Wouldn't you only answer the new matter

brought up by the defense in your rebuttal?

MR. KEENAN: Well, that would largely depend upon how new matters were so construed to be new and how they were treated by the defense counsel.

MR. FURNESS: Except on the basis of the Charter as an objection to our having a right to reply.

MR. KEENAN: Because the Charter makes no provision for it.

MR. FURNESS: I say except for it. I am trying to ask the same question that Judge McDougall asked.

MR. KEENAN: In ordinary prosecutions, I think, in every state, not alone in Anglo-Saxon countries, the prosecution has traditionally, where there is a division, the right to open and close. The defense doesn't have the right to open and close because the prosecution has the burden.

MR. LOGAN: Those are mostly jury cases, Mr. Keenan. This is different.

MR. KEENAN: That is true. But when we get down to brass tacks, I think we all know the issues abundantly, we all know the evidence or should, and we have a right to set forth our claims with reference thereto, and I don't think it calls for multi-

plicity of speeches in that regard.

MR. JUSTICE McDOUGALL: The reason I asked that question, Mr. Keenan, was, if the order could be taken, as I suggested, that the Tribunal would be in a better position. In other words, it is such a big case, there is so much involved, that if we can get a clear exposition of the whole picture followed by the individual replies of the accused, then it might be a benefit to us, and that is why I asked you if there was any --

MR. KEENAN: It might be a benefit to you?

MR. JUSTICE McDOUGALL: A benefit to the Tribunal. In other words, if I hear a case, I want to get a picture of what it is first, followed by the contentions. The prosecution can give the whole picture better than the individual defendants.

MR. KEENAN: That is true.

MR. JUSTICE McDOUGALL: And in that way, if it is possible, I personally think it would be a help to the Tribunal. And that is why I asked, because we would have to discuss with the other Members of the Tribunal what the real objection to it is other than the interpretation of the Charter.

MR. KEENAN: Well, there is another point. I think your point is well taken from the standpoint

of the Court.

MR. JUSTICE McDOUGALL: You want us to understand it, and we want to understand it.

MR. KIENAN: That is true. But I have to make this statement, and it is frank and a little bit unpleasant, and one that I do not want to have ascribed as a personal matter, that if we make our opening statement and open up a field for long, interminable arguments, I want this case brought to a just conclusion but to a conclusion. Perhaps we could make some reasonable stipulation as to time and the like. I see the point that is raised by the Justice; and not alone, I see the fairness of permitting a reply. I have always felt that way. I don't think this Charter permits us to do it. But if the Court believes otherwise, and if the Court feels that it will be substantially aided by a different procedure, I think, after all, when we get down to the essence of this matter, the real purpose of these summations is to aid the Court; and in the event the Court would feel that it would be better satisfied by having us make an entire exposition of our case and quitting even though we quit there, and let the defense close, I haven't an objection to it provided it doesn't open up the field for internal

discussion in the courtroom that would last a period of time and that might vitiate the entire value of these proceedings. Many of my colleagues do not feel the same way as I do, but I am chiefly concerned, and very conscientiously, in aiding this Court in every way I know how. And if that is the view of the Court --

MR. JUSTICE McDOUGALL: No. That is only my own view.

MR. KEENAN: I understand that. But, if that should be the view of the Court, of course, we would be able and willing and would have to, but it would be quite gracious and heartfelt in attempting to comply with it.

MR. JUSTICE McDOUGALL: What I really want to get at are the basic objections to doing it that way so we should consider then if it should be suggested to the Tribunal that they adopt this course.

MR. BLAKENEY: May I say a few words on this point? Speaking for myself only, of course, I suspect that the summation which I would make would probably be much briefer and certainly much more to the point if I had first heard the summation of the party bearing the burden of proof. Failing that, I am compelled to deal in a rather elaborate fashion,

perhaps with many matters which the prosecution may in the end say they don't rely on. It has, in fact, happened more than once during the progress of the trial that we have introduced evidence to rebut what we considered to be a point proved or undertaken to be proved by prosecution evidence only to have a disclaimer made later that the prosecution wasn't in any way relying on it.

MR. KEENAN: May I ask a question of the defense counsel here at this time? If we do agree, if the Court decides, if the Court would be in any way influenced by our own views, provided we have certain rights under the Charter that we might waive, and we can call it that, would you require a period of time or an interval after the summation is prepared and delivered to take it apart and prepare your answers to it? That is the thing that I fear more than anything else. If you will agree to go forward --

MR. LOGAN: That might depend, Mr. Keenan. How long do you contemplate your full summation would take? It is a question of time. If we could find out, we could probably answer you.

MR. KEENAN: I would say it would consume somewhere between three and four days.

MR. LOGAN: Five days.

MR. KEENAN: Let's say a five day limit.

MR. LOGAN: Say, for example, ARAKI got your full summation on the first day. That would give him seven days in which to revise his summation, which will be pretty well prepared by then, eliminate that which doesn't touch him, and add points, perhaps, which you have touched in your summation. It is a question of time, whether that would be long enough.

MR. BLAKENEY: I think the real difficulty is on the translation and processing. Other than that I don't see why not.

MR. LOGAN: It is a question of time then.

MR. JUSTICE McDOUGALL: It does seem it pretty nearly dissolves any hope of getting it done that way because, if there is to be an interval of time between prosecution summation and defense opening, there is going to be such a strain on the processing and the mechanical work, and the time lost in between, that it might make the whole thing --

MR. LOGAN: We would have the benefit at that time of the prosecution's processing staff -- it would probably have no need for it at that time -- and our own.

MR. KEENAN: We cannot make that commitment

at this time.

MR. BROOKS: Of course, that could be eliminated, Mr. President, if we have a limit placed upon the length of time each would have and if we had the prosecution's summation a little earlier in advance. As I understand, it is fairly well organised. If we could have it a little earlier in advance, that would give us plenty of time to meet it. I know, in my own individual cases, it would cut down my summation immeasurably if I knew what points the prosecution is willing --

MR. KEENAN: I really think the answer to that is that it is more theoretical than practical because I think you can rest assured that we will follow in the main the outline of the opening statement of this case, and we will rely solely upon the evidence, of course. And the evidence is well known to all of these accused, and I suggest, most respectfully, to Mr. Justice McDougall that the Court might be able to have that document which it is desirous of having, to completely state the case at the time of its consideration.

I think that any departure from the language of this Charter, which I have reason to believe was very carefully worked out at the time, will be most

mischievous and lead to incalculable delay and will serve no real substitute purpose excepting, perhaps, that it will not give the Court as clear an idea as it would otherwise if we made our entire presentation first. And if it is for such purpose, Mr. Justice, that it is desired, then there is not a reason in the world why the accused should stop for a moment and shouldn't go forward with their own answers to the charges in the Indictment and list the evidence for themselves because, whatever arguments we make, they will be specious or sound. If they are specious, they will be disregarded. If they are sound, the astute lawyers for the accused will already have known what they must be by their thorough familiarity with this case. That is our position.

MR. YAMAOKA: Mr. President, may I make a frank suggestion? If Mr. Keenan and prosecution could agree to furnishing the defense, let's say a week before the close of the case, with a copy of their summation, that might give us enough leeway to work out our mechanical processes so that the time element will be saved.

MR. McMANUS: I would be vitally interested in that, having ARAKI.

ACTING PRESIDENT: You're under the guns on

that thing.

MR. JUSTICE McDOUGALL: Yes, and you won't have seven days. I don't see your seven days there unless it is served ahead of time.

MR. LOGAN: If the summation would be served the first day, the summation is served the first day.

MR. KEENAN: Mr. President, just a parting word on this. I don't want to plead the burden on the prosecution, but it has been a tremendous one, and it is all centered, necessarily. We have a very small staff, as you all know, at this time, and it is all centered on a few individuals to do a job while that isn't at all the situation with the accused. While we have not alone to state the general propositions and charges and establish the charge of crime against individuals and conspiracy, we have to do it, a few men as against twenty-five. That burden is divided among you people. You have no such burden as we have. We have been working on it diligently, but we have been resting upon our own interpretation. We think it is clear in the Charter, and we don't want to make any commitments that we won't be able to fully comply with.

MR. LOGAN: May I ask you there, Mr. Keenan --

MR. KEENAN: I will say this: that just as soon as we have our summation ready, we will serve copies thereon to the accused, and we will have no objection to their adverting to them as though it had been delivered, and also serve copies to the Court. And if we get them ready before the accused starts its summation, most assuredly we will be glad to turn them over.

MR. BRANNON: Your written brief?

MR. KEENAN: No, No, our summation. It is all to be written.

MR. BRANNON: Didn't you just say that you were not going to do that a moment ago?

MR. KEENAN: I did not. I didn't intend to.

MR. BRANNON: I thought you said absolutely not.

MR. KEENAN: I say we cannot commit ourselves to do it at a particular time, and I am saying we will do the best we can because we have practical difficulties confronting us. We have got to cover the whole field, and we have got to have it processed and all that work done. It is a historic document and has to be very carefully done. We don't want to commit ourselves to doing it at an earlier moment than we will be able to fulfill. At the same time

we don't run a ladies proceedings, and we don't believe that there is any real need whatsoever for the accused, in order to fully perform their duties, to do anything more than examine the Indictment, examine the evidence and make their own argument.

MR. LOGAN: Mr. Keenan, maybe we can clarify it this way: On the motion to dismiss after the prosecution's case you read in Court document 0003.

MR. KEENAN: It was read by the prosecution.

MR. LOGAN: Yes. I say "you" speaking about the prosecution. And at the same time or a few days before that you had submitted 0001. But in 0003 you had incorporated 0001. Do you plan to do the same at the end of the case?

MR. KEENAN: We do not. We plan to make a summation. And, in the event that the Court permits briefs, as we hope the Court will, we want to be accorded the same privilege as you have. But, other than that, we are not going to introduce or read any documents in evidence whatsoever after the taking of all the testimony except the summation itself. Is that clear?

MR. LOGAN: So there will be no document like 0001 at the end of the whole case which is not read in court but submitted to the Tribunal.

MR. KEENAN: I am informed that there is a possibility that there might be a summation with reference to the atrocities that will be separate because of the classification of A and B and C crimes in the Indictment. But, with the exception of that -- and we might for the purpose of shortening the trial make a suggestion that that not be read because it may cover details that will already have been before the Court. It will serve no real purpose. I hope that that, too, can be prepared as a part of a summation and can form a single document.

MR. LOGAN: Will that be incorporated by reference in the summation?

MR. HORWITZ: It will be part of it but not read.

MR. JUSTICE McDOUGALL: I take it, Mr. Keenan, that all your arguments will be written.

MR. KEENAN: Yes.

MR. JUSTICE McDOUGALL: Either read before the Tribunal or, as you say, submitted in the form of briefs but not to be read, so that we know that it will all be, and the defense will do the same. You will all have them written before you approach the lectern.

MR. KEENAN: I assume that is a well under-

stood procedure.

MR. JUSTICE McDOUGALL: That is our practice.

MR. LOGAN: Do you have any objection, then, if you insist on adhering strictly to the words of the Charter, if the defense filed replies or gave oral replies to any new matter which came up in the prosecution's summation and which could not have been anticipated?

MR. KEENAN: As you state it, we do because that would give the defense the right to open and close, but we do not object. In fact, we urge upon the Court, respectfully, that they permit that opportunity to reply by brief.

MR. LOGAN: Well, you understand, though, Mr. Keenan, in this trial which is so different from the usual case, as you said at the beginning of this hearing today, where there are so many years covered, so much evidence in, that it is difficult. It is in this case, I know.

MR. KEENAN: Probably more than any other in your case.

MR. LOGAN: It is difficult to know just exactly how this applies to my client. "Must I consider it? Must I answer it in summation?" I don't know. And it is so difficult for me to prepare a

summation not knowing just where the prosecution claims it has met the burden and met the issues.

MR. KEENAN: With reference to your client, Mr. Logan, I will tell you directly outside of these Chambers exactly what our theory is, and there will be nothing new in it of any substance. It will follow the theory which I will outline to you very clearly. There will be no advantage in doing that.

MR. LOGAN: I am not asking for special privilege. Probably other defendants are in the same position. I am talking about my own case.

MR. KEENAN: But I would recognize the fact that you have an accused whose period of activities runs from the beginning to the end, and that isn't true with all the accused.

MR. McMANUS: Mr. President, my idea of the summation was just to review the testimony that was submitted and no new matter was to be brought in at any time.

MR. KEENAN: Who is talking about new matter? I don't understand that. Did you have an idea that someone is going to advert to something outside the record?

MR. McMANUS: Something was said about if there was any new matter brought in.

MR. LOGAN: No. I say, if the defense gives their summation and the prosecution then gives theirs, there might have been something covered in the prosecution summation which I hadn't covered in mine which I hand't anticipated the prosecution would rely on.

MR. KEENAN: It is not infrequent in trials that that happens.

MR. LEVIN: Mr. Keenan, I would like to ask you just one question. Maybe I misunderstood you. You said that you would object to the defense replying to the summation of the prosecution --

MR. KEENAN: Orally.

MR. LEVIN: -- orally. Do you mean by that -- for instance, you have now stated that you are willing to serve upon us --

MR. KEENAN: Wait a minute. Not serve upon you. If I get the summation completed, as I hope I will, we are willing to serve English copies. We do not want to be bound by the rule of the Court of processing at that time because that may save a lot of time to permit us to do it. And I keep my word on that.

MR. LEVIN: We have no doubt about that. Then am I to understand that in my argument or the argument of Mr. Logan he can make any reference to

the anticipated argument that you are going to make?

MR. KEENAN: You can refer to anything that is in the evidence and anything that is in the statement that is given to you. That would be the purpose of giving it to you, but not for delay.

MR. LEVIN: No. I wanted to be sure that I understood what you meant when you said not to make any reply.

MR. KEENAN: What I expect from the last meeting with the Acting President, and I know he is only speaking in the moment, is a tentative agreement with himself that when we get through with the taking of this evidence that we do as in every other case: Whoever has the burden begin immediately the summation without any hiatus whatsoever; whoever has that burden, at the end of the taking of the testimony, it be understood that he gets right up and have his document prepared, whoever he is. In the meantime we will do everything we can to expedite the preparation of our document. When we do, without waiting for it to be translated, we will be glad to give a copy to everyone of the counsel.

MR. LOGAN: Mr. Keenan, as I said --

MR. KEENAN: And you can use any part of it for any reason that you want during your arguments.

MR. LOGAN: As I said at the beginning of this hearing today, to me it doesn't make any difference what the order of procedure is so long as I have an opportunity somewhere along the line to answer the prosecution's summation.

MR. JUSTICE McDOUGALL: On that point, Mr. Logan, I just want to ask a question. I understood you to say, Mr. Keenan, that the prosecution would have no objection to the defense filing briefs, as you call it.--

MR. KEENAN: Exactly.

MR. JUSTICE McDOUGALL: -- after the prosecution argument or summation to cover such points. That wouldn't necessarily be read, but that would be, as far as I am concerned, unobjectionable. In fact, I would be glad to have it because then it would give us the argument on the whole.

MR. KEENAN: We would like to have that a bi-lateral argument so that both sides would have the right to file briefs on the other's argument.

MR. LOGAN: It is your answer. If we go first, you are answering us.

MR. KEENAN: Yes, but in the event there are briefs filed, we will assume that you may have some matters -- oh, yes, it could well be that after you

get through with your summation and after we get through with our summation that you would file a brief in which something would be grossly distorted, and we wouldn't want that to occur. We would have the right to set forth our views, too. That wouldn't harm you because we will have already stated our entire case as we saw it. You will have stated yours; you will have answered any points you have to answer with us; and that would give us the right to reply in kind which everyone of you know is the prevailing rule in all your jurisdictions: the right of the one bearing the burden, in this case the prosecution, to open and close. And that is all it does, and it is eminently fair.

MR. HORWITZ: Can I point out one fact to Mr. Logan? Our summation is being prepared now and will be finished, we hope, before you have your summations prepared and delivered. Therefore, in order to answer your arguments we have to anticipate them. We really have no opportunity at any time to meet the arguments that you may raise unless we have the right to file a brief in the summation, except to anticipate arguments that we believe you will raise because, the thing is so big, we cannot wait until you deliver your arguments in order to write ours. We

have an over-all problem that has got to be done now before we hear one word that you say, so that we have the problem of anticipating your arguments even though we have the right to speak last. We really are not answering you at all. We are answering you in accordance with the way we think you are going to raise certain matters, but we are actually not answering.

MR. KEENAN: That is the reality of it.

MR. BRANNON: Why would you object to switching it around the other way then?

MR. KEENAN: I have given my reasons already.

MR. BRANNON: Mr. President, we had a meeting today, quite a number of the defense counsel, in regard to your memorandum, and I made some notes here which I might save you a lot of time if you will allow me to read because I think it represents a majority of defense opinion. Would you care to hear it?

ACTING PRESIDENT: Go ahead.

MR. BRANNON: "It is so elementary as to hardly be worthy of mention that the prosecution is charged with the burden of proving its case and going forward with the evidence. The defense is

always entitled to answer the prosecution's evidence. It likewise follows that at the time of summation or final argument it is only fair that the defense be apprised of the prosecution's contentions and how it construes the evidence that has been presented. The defense then has a chance to answer step by step not only the evidence of the prosecution but its contention of what that evidence has proven.

"Thereafter, the prosecution, because it does have the burden of proof, may rebut the defense argument to its original summations. I believe the Supreme Court of the United States of America clearly sets forth this theory for its rules of procedure and provides that the appelant who has the burden of proceeding with his appeal argue first. Nothing could be simpler or more understandable than this principle of jurisprudence that the defense need only meet the evidence and allegations of the prosecution and that they be given the right to do so. To adopt the procedure set forth in this Charter is to give the prosecution the right to present its evidence first and last, to hear the defense argument and to then answer it and go on with its explanation of what the evidence has proven.

"Such an obvious disadvantage should not be

tolerated; and, if it demands that an appeal be made to the Supreme Commander to amend the Charter, we feel it is the duty of the Tribunal to request that such steps be taken.

"As to the length of time of the arguments, defense feels there should be no restrictions. They should be trusted to confine their arguments to essential matters and to be expected to observe the necessity for saving time.

"Some general arguments will no doubt be made by the defense on behalf of all of the accused or the majority thereof. The men who make these arguments reserve the right to later make individual arguments in favor of their respective clients. To follow any other procedure would be for them to sacrifice the valuable time they possess in favor of the group as a whole.

"As to submission of arguments on briefs, the defense unanimously agrees that they should be given the unrestricted right to fully, orally argue their case and to submit briefs in support if they so desire but that under no circumstances should they be hampered in any way toward making a full oral argument."

Mr. Logan touched on the first matter.

At any rate, that is the contents of our

discussion to date, and I said I believe it represents the best majority of the defense.

MR. KEENAN: I have to say, Mr. President, in reply to that, that the proceedings in this courtroom have shown that not all of the counsel have been as time conscious as the memorandum read would indicate and that there ought to be some definite limitation placed upon the period of time to be consumed by prosecution and defense.

ACTING PRESIDENT: That is my personal opinion. I don't know how the Tribunal feels about it, but you have to put some limit on it.

Now, as near as I can figure out, the prosecution and defense aren't together on anything, are you?

MR. KEENAN: Excepting that we agree that the sensible procedure is to provide for written briefs to be filed and submitted to the Court. Do we all agree on that or is there any dissent?

MR. BRANNON: That it be mandatory or permissible?

MR. KEENAN: Permissible, within a distinctly fixed time limit.

MR. BRANNON: Which in no way restricts the oral argument.

MR. KEENAN: Well, that I would think would restrict unreasonable requests made for unlimited oral arguments, yes, because it would provide a complete answer to the contention of any man that a failure to permit him to talk weeks if he saw fit would prevent his accused from getting a fair trial. It would also answer any question about the unfairness of not permitting the defendant to give a reply.

MR. CUNNINGHAM: They handled that pretty fairly at Nuernberg. They gave them a court day each if they took it, and very few of them took their full time. Four and a half hours: that's a fair enough limitation.

MR. KEENAN: I don't think that was the limitation at Nuernberg.

MR. LEVIN: It was four hours. I read it in the record.

ACTING PRESIDENT: I would rather make it some other --

MR. LEVIN: Four hours, and each individual was allowed not to exceed twenty minutes in making a personal statement.

MR. CUNNINGHAM: Ten minutes at the end, as I understood it.

MR. LEVIN: Goering was allowed twenty

minutes.

MR. KEENAN: That is not permitted under this Charter. It provides that counsel speak for his client.

MR. CUNNINGHAM: That is a courtesy, maybe, that we don't require, but one court day each or four and a half hours seems to be an arbitrary but a reasonable time limit.

MR. KEENAN: I think it is outrageously long.

MR. CUNNINGHAM: Well, they didn't use their time. It does away with any complaint that they haven't adequte time to finish.

MR. KEENAN: But they didn't have American counsel for defense over at Nuernberg.

MR. CUNNINGHAM: That's right. And, if they did, they would have probably extended it far beyond the four and a half hours. They would have had to limit to a week instead of a day.

MR. LEVIN: I think there is one other question which Mr. Brannon may have brought out, and that was the question as to whether or not -- and I think it was the concensus of the defense counsel -- whatever time is permitted may be divided between them and Japanese counsel as they see fit. In other words,

if I want to take a portion of the argument in my case and Dr. TAKAYANAGI will take another portion in the same case, why, that would be permissible provided we do not exceed that limit. I mention that especially -- of course, in relation to myself, but particularly because it relates to Dr. TAKAYANAGI. The Court has already indicated that he would be permitted to make his legal argument which he attempted to make in connection with the motions for dismissal.

MR. KEENAN: It didn't say whether we would make it orally or by brief, did it?

MR. LEVIN: No.

MR. KEENAN: It is your suggestion that we have two counsel argue for one man?

MR. LEVIN: If they decide to do so.

MR. KEENAN: I would object to that.

MR. BRANNON: If we are allowed a set time, it would make no difference whether I talked or my Japanese counsel.

MR. KEENAN: Yes, it would. It would make a distinct difference.

MR. BRANNON: Because we would still be entitled to take all of that time.

MR. KEENAN: That is exactly what I am saying. If you give the defense an opportunity for a full day

in court, it is an unreasonable period of time. It isn't required for the discussion of the issues of this case at all, and you know that very well. I think it is very likely that you wouldn't even take a part of that time for your own man.

MR. BROOKS: But in a case like that, there will be a few instances where a certain number of us will not take a full day, and if each one of us is given a full day, we can -- the time that is saved from each man's case, just an hour or so on each man's case, could be put in for the time to be used for general arguments on law and other --

MR. KEENAN: I don't think that would work out at all. I would think it would an entirely reasonable procedure to suggest that the defense in general have the right to one argument upon the law of the case, one argument upon whether a crime has been committed by way of conspiracy as generally alleged by the prosecution, and I think that the rest of it ought to be addressed to the individual accused's case whether or not they were implicated or involved by the evidence in such crime; and I think it would be entirely proper to have, perhaps, a full day given for the discussion of the law and another day given by learned counsel who carefully

prepare themselves to claim that no crime had been committed on the facts. And then, I think, thereafter, when that is done, it becomes a simpler matter for the rest of the accused if they would confine themselves to the argument of the involvement of their own client.

MR. BROOKS: What I had in mind was, because of the variance between some of these cases, some men might only take an hour where another one would need a day or longer in an instance or two, and in such case, with the number of accused we have, that if each man was allowed a day for his accused, we would be allotted that total time for the defense and we divide it among ourselves for general arguments and individual arguments, and that's all the time we have; and whoever makes it, that is immaterial.

MR. KEENAN: That is exactly what I object to, and I think it is wrong in practice and in theory because it allows men who like to talk to have conferred upon them the right of several days. It is entirely unreasonable.

MR. BROOKS: That would be at the expense of those others --

MR. KEENAN: It is at the expense of the U. S. Government in the first instance and all of

these nations in the last and the expense of the value of these proceedings unless we get them terminated within a reasonable period of time.

ACTING PRESIDENT: That is another thing that the Tribunal has to consider. I think we have got enough now so we can, after we get the minutes of this meeting -- I am now glad that we did have a reporter here, and it is not going to be distributed until Monday -- try to get the Tribunal together on Tuesday afternoon so they will have a chance to study it; and later we can get together in another meeting with you gentlemen.

MR. LEVIN: I would like to make one further observation in reply to Mr. Keenan in respect to the suggestion I made. It would be naturally understood, if there is a division of time between counsel, that the second counsel that argued his portion of the case would not repeat anything that the first counsel said.

ACTING PRESIDENT: Yes.

MR. LEVIN: In view of the fact that the arguments would be all written and prepared, there'd be no loss of time.

MR. KEENAN: Might I make one more suggestion before we adjourn, and that is to respectfully ask the

Court to give consideration to the practice in Nuernberg where the practicalities of the case were given thought together with the rights of the various accused. Perhaps some of them might be entitled to more time than others. But would it be possible for all of the counsel for the accused to get together? You have some very able men among you who will take the burden of arguing the law once and for all and someone else arguing the major question of whether there is a conspiracy.

MR. CUNNINGHAM: Wednesday that question came up, Mr. Keenan, and you suggested one man or two. We suggest, give us a definite time and let us divide that time as we see fit in the manner in which we consider most effective. Don't you see?

MR. KEENAN: I think that's a reasonable suggestion to do it that way. It is not for us to even suggest to you.

MR. BROOKS: In other words, Mr. Keenan, if we were given a definite limit of one day per man, then among the group of us we have to agree. Otherwise we have no way. I have no way of making Mr. Brannon or Mr. Levin or anybody else, for example, agree that he will go and someone else will go and take so much time. We have to agree. If you say

each man has one day, that is for everything.

MR. KEENAN: Each man having only one day is twenty-five days.

MR. BROOKS: We may not take it.

MR. KEENAN: Well, you may, and it would lead to an utterly absurd result in this case.

MR. LEVIN: I would like to say at that point, Mr. Keenan, that I know, I am almost certain, that at least four or six of our defense counsel would not take over an hour or an hour and a half.

MR. KEENAN: Is that any reason why any other man should take any more than required for his case?

MR. CUNNINGHAM: Yes.

MR. KEENAN: Do you realise what I said? I asked you if that is any reason why any other defense counsel should take more time than is required for his case, and you said "Yes."

MR. CUNNINGHAM: But that is the reason. Everybody should take the time they require.

MR. BLAKENEY: I should like to say on this question of time that I think every one of us has tried cases which lasted for a matter of weeks, and the argument lasted for days. Now, this case lasted for years almost, and to say that four and a half hours -- what is our court day? Four and a half

hours -- is an unreasonable time to argue a case extending over that length of time and space, I think, is indefensible.

MR. JUSTICE McDOUGALL: That is what we want.

MR. BLAKENEY: Some of them can be argued in an hour, and I can name you two or three that cannot be argued in less than one day.

MR. JUSTICE McDOUGALL: That is all we need, both views.

ACTING PRESIDENT: Do I understand you correctly as asking for a day apiece? That includes your arguments on the general proposition of the law and every individual defense and everything.

MR. BROOKS: I think so.

MR. CUNNINGHAM: He suggested a day set aside for the law and a day set aside for the general proposition and to give each defendant one day individually.

MR. KEENAN: I think that is an outrageous proposition and perfectly absurd.

ACTING PRESIDENT: I just want to get that.

MR. CUNNINGHAM: I think that is a minimum requirement.

MR. BROOKS: I suggest it as a minimum.

MR. FURNESS: I would like to adopt the suggestion of the President that we have a day apiece.

MR. KEENAN: I don't think that is the suggestion of Judge Cramer. He is asking a question.

ACTING PRESIDENT: I don't know if I got your suggestion straight.

MR. FURNESS: I would make that suggestion so that it can be a matter of record.

MR. JUSTICE McDOUGALL: We will consider it.

ACTING PRESIDENT: We will see you next week.

(Whereupon, at 1730, the proceedings were concluded.)

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